THE SUPREME COURT

Record No. 2021/106

Dunne J.
Charleton J.
O'Malley J.
Baker J.
Woulfe J.

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

v.

JOSEPH BEHAN

APPELLANT

Judgment of Ms. Justice Iseult O'Malley delivered the 30th of May, 2022

Introduction

1. The appellant was convicted of a number of offences arising out of an attempted robbery of a business in a shopping centre. A firearm was discharged during the incident. Two staff members were injured, with one receiving a life-threatening injury. The appellant's appeal against conviction was dismissed in the Court of Appeal (see *People (At the Suit of the Director of Public Prosecutions) v Behan* [2021] IECA 200). Leave to appeal to this Court was granted on the 15th November 2021 (see *Director of Public Prosecutions v. Behan* [2021] IESCDET 127).

2. The issue in the appeal is the validity of a search warrant, on foot of which incriminating evidence – primarily, a glove bearing traces of firearms residue and the DNA of the appellant – was found in the appellant's home. The warrant was issued by a detective superintendent acting under the provisions of the Criminal Justice (Search Warrants) Act 2012. That legislation amends the Offences Against the State Act 1939 by substituting a new section for s.29. In brief, the effect is that search warrants relating to the commission of offences to which the Act applies are normally to be issued by judges of the District Court. However, a member of the Garda Síochána not below the rank of superintendent may issue a warrant if there are circumstances of urgency rendering an application to a judge impracticable. Subsection (5) provides that an officer may issue a search warrant "*only if he or she is independent of the investigation of the offence*". The word "*independent*" is defined in subs. (12) as meaning "*not being in charge of, or involved in, that investigation*".

3. On the facts of his case, the appellant contends that the detective superintendent who issued the warrant was not independent of the investigation because, although he was not involved in the investigation up to the point where he was contacted and asked for a warrant, it was inherent in the nature of his particular role as a Division Detective Superintendent that he would be involved thereafter and he did, as a matter of fact, become involved.

The issue in the trial

4. The validity of the warrant was the subject of a *voir dire* in the trial, and the relevant evidence may be summarised as follows.

5. An attempted robbery occurred at a pizza shop in the Edenmore Shopping Centre, in the Coolock area of North Dublin, at about 12.20 a.m. on the 1st January 2019. The perpetrator arrived on a bicycle. He entered the premises with his face covered, carrying a handgun. He was wearing gloves. He threw a plastic bag over the counter and demanded money. There were several staff members present, celebrating the New Year. They responded by throwing missiles at the man, who eventually retreated but fired at least two shots. Two staff members were injured, one very seriously.

6. Gardaí arrived at the scene very soon after. CCTV footage from the various cameras at the shopping centre was examined. The incident in the pizza premises could be seen, as could some houses in the vicinity of the shopping centre. Examination of the footage showed that the perpetrator had left No. 48 Edenmore Park on a bicycle, cycled to the pizzeria and, after the shooting, had immediately cycled back to the same address. This was a dwelling house about 200 metres away, and was a family home in which the appellant lived with his mother and two brothers. It was also apparent that, immediately after the return of the perpetrator to that house, a person cycled the bicycle away in a different direction. The appellant subsequently told the investigating gardaí that he had been at home throughout this period.

7. It may be noted that in addition to the glove found in the search of the house, the prosecution relied upon evidence that the appellant's DNA was found on the plastic bag thrown on the counter of the pizza shop, and that other CCTV footage showed that the trousers and shoes worn by the raider were the same as those which the appellant had been wearing while walking around the shopping centre, with his face uncovered, earlier in the day. The prosecution case was that the person who cycled the bicycle away from the house was Anthony Behan, the older of the appellant's two brothers, and that he was assisting the appellant by disposing of the bicycle. Anthony has been convicted in relation to his role in the offence. The case against him appears to have been based upon the clarity of the CCTV footage showing him at the front of the house, taking the bicycle after the return of the perpetrator, and returning on foot. He also identified himself and his clothing from some other footage from around the area. (The younger brother was eliminated as a suspect at an early stage.)

8. To put the evidence relating to the search warrant issue into context it is necessary to explain some matters relating to the organisational responsibilities of the two principal

witnesses. Superintendent Donnelly was the district officer for Coolock. Coolock was one of four districts in the northern division of the Dublin Metropolitan Region, each of which had its own superintendent. Detective Superintendent Scott was the division detective superintendent.

9. According to Superintendent Donnelly, responsibility for an investigation rested with the district officer and the senior investigating officer (the latter being nominated by the chief superintendent) but the division detective superintendent would be made aware of any serious incident and would have "oversight" of the investigation. That "oversight" role did not mean that he would be "managing" Superintendent Donnelly.

10. Detective Superintendent Scott said that he would certainly be notified about a serious crime within the division. Whether it would be necessary for him to attend at a scene would depend on the circumstances. In some cases, he might have an investigative role but more generally it was oversight. Asked what "oversight" meant, he said:

> *"Well, you would involve yourself in the overall management of the investigation to make sure that it's on track and that things that should be done are done as best possible".*

11. He agreed that this could involve making sure that a file being submitted to the Director of Public Prosecutions was in order, or giving an opinion as to whether there was sufficient evidence for a charge. He would attend daily conferences in relation to any particular investigation.

12. As the district officer, Superintendent Donnelly was contacted soon after the incident and arrived at the scene at 12.50 a.m. He was briefed by other members present and viewed the CCTV footage. He formed the view that a search warrant would be needed in respect of the house. At 1.18 a.m. he contacted Detective Superintendent Scott. Asked why he had taken that step, he answered:

> *"Because I couldn't issue the warrant because I needed somebody who was independent of the investigation at that stage. I was aware of the situation, I had*

viewed the CCTV footage at that stage and I was on scene at that stage, so I was not in a position to issue the section 29 warrant myself, so I required somebody who was independent of the investigation to issue a warrant and that was the reason that I contacted Detective Superintendent Scott because, at that time, he was independent of the investigation, okay."

13. The witness stated that he did not apply to the District Court because it was half past one in the morning. There was a degree of urgency, because there was a lot of movement around the house. A firearm had been used and the matter had the potential to become a murder investigation. It was necessary that a warrant be issued urgently so that the house could be searched.

14. In the meantime, in view of the fact that a firearm had been discharged, Superintendent Donnelly arranged to have an armed support unit and the emergency response unit available.

15. It was put to Superintendent Donnelly in cross-examination on behalf of the appellant that there were many other superintendents available to him in Dublin, and that he should have contacted any of them rather than a person who was liable to be involved in the investigation in a managerial role. He responded that his concern at the time was the "sheer urgency" of the situation. At that time, Detective Superintendent Scott was not involved in the investigation. If he had not got through to him on the phone he would have looked for another superintendent.

16. It was further put to the witness that Detective Superintendent Scott did, in fact, get involved in the investigation. After issuing the warrant he remained in Coolock Garda Station, and nominated the member tasked with the arrest of the appellant. Later, he directed the taking of forensic samples from the appellant. This was described by counsel as "effectively sharing responsibility for the management of the investigation" with Superintendent Donnelly.

17. Detective Superintendent Scott said in evidence that he went to the shopping centre on receiving the call, was briefed there by Superintendent Donnelly and viewed the footage.

He was satisfied that there was a direct connection between the firearms incident and the house, and that evidence relating to the offence could be found in the house. He was further satisfied that a search warrant was necessary for the proper investigation of the offence of the discharge of a firearm with intent to endanger life. He said that in assessing the urgency of the situation he took into account the closeness of the scene to the house and the fact that persons in the house could see what the gardaí were doing. It would probably have taken two hours to get a District Court warrant, and that was impractical in the circumstances given the risk that evidence would be lost or destroyed. He issued the warrant at about 2.30 a.m.

18. The witness stated that he became aware that a person had left the house and had been stopped by an armed unit. He said that it was not best practice for an arrest relating to a firearms offence to be carried out by an armed garda, because of the risk of contamination of evidence. He therefore instructed an unarmed member to carry out the formal arrest, which happened at 2.56 a.m. (about a minute or two after the stop). Later, he authorised the taking of samples from the appellant for the purpose of testing for firearms residue. Superintendent Donnelly said that he had not been personally aware of these directions at the time, as his attention was taken up with other aspects of the investigation.

19. In submissions on behalf of the appellant, counsel accepted that the circumstances had been such that it would not have been appropriate to wait for a District Judge. It was therefore appropriate that a superintendent should issue the warrant. However, given the number of superintendents available for that function, Detective Superintendent Scott should not have been asked. It was submitted that there was an "overwhelming inference" as to why he had been called – it was because he would have been called anyway, to assist in a serious criminal investigation. Although he had used the word "oversight" he had in fact had a hands-on role. Section 29, as amended, did not exclude only those garda officers "in charge" of an investigation but those who were "involved".

20. Counsel argued that the legislation had been introduced because of the decision in *Damache v. Director of Public Prosecutions* [2012] 2 I.R. 266 ("*Damache*"), and that the *ratio* of *Damache* was that a person who had a stake in the outcome of a decision-making process should not be the decision-maker. In this case, Detective Superintendent Scott did have a stake, because he would be involved in the investigation and would therefore have a stake

in its successful outcome. He was involved in the investigation from the moment he was contacted, because it was his job to get involved, and Superintendent Donnelly was thereafter at least sharing responsibility with him. The statutory requirement of independence applied even in urgent circumstances.

21. The trial judge took the view that it could be said of any other senior member of the Garda Síochána that they would have an interest in the proper investigation of a crime. He considered that the relevant consideration was that the person making a decision to issue a warrant should come to that decision without knowledge of the investigation, and therefore taking account only what was put before them in the application. That was the situation when Detective Superintendent Scott issued the warrant. At that stage he was an independent person. His actions thereafter did not affect that.

22. Of the items taken in the course of the search of the house, the most significant was a glove upon which was found both firearms residue and a DNA profile matching that of the appellant. The firearm was not recovered.

The Court of Appeal

23. The judgment of the Court of Appeal was delivered by Birmingham P., with whom McCarthy and Kennedy JJ agreed.

24. At paragraph 15 of the judgment, the Court made some important observations of a general nature. It was said that the "general expectation" was that warrants would be sought from and issued by judges of the District Court. It was only in cases of urgency that the question of seeking a warrant from a Garda officer arose. Where that was so, the officer to be approached should be one who would not be expected to have an involvement in the investigation at any stage. (However, in so saying, the Court added that it recognised that in a case of urgency it might be that the full extent or direction of the investigation that would follow would not be apparent.)
25. The Court considered that the contact made by Superintendent Donnelly with Detective Superintendent Scott was not open to the interpretation that he was, in effect, inviting

Detective Superintendent Scott to become involved in the investigation. He contacted him because he needed a superintendent who was independent of the investigation and felt, at that stage, that Detective Superintendent Scott fell into that category. In deciding to issue the warrant, the detective superintendent had not relied upon what he was told but had viewed the footage independently, and was in a position to make an independent assessment.

26. The Court did not consider that the subsequent participation of the latter in the investigation altered that situation, taking the view that "any investigator worth his salt" would have decided to assist.

27. In rejecting this ground of appeal, the Court also observed that if the trial judge had accepted the argument that the detective superintendent was not independent, he would have had to have gone on to consider whether the evidence should be admitted or excluded. It did not see such a situation as giving rise to a finding that there had been a conscious and deliberate violation of the appellant's rights. Superintendent Donnelly had believed that he had made contact with an officer of the requisite rank who was independent of the investigation, and if he was wrong about that it was at most a mistake in the interpretation of the law. It was not a mistake that had any practical consequences. The case differed from those where an assessment had to be made of the available intelligence, and of the rights of the State and the investigation against the rights of individuals – here, all that was involved was a decision based on the footage.

Submissions in the appeal

28. The appellant submits that the *nemo iudex in causa sua* principle underpins the *Damache* decision, and that it precludes a person who has a direct and significant interest in the outcome of an investigation from issuing a search warrant in that investigation. If s.29 is to be given an interpretation that secures its constitutionality, the question whether a person is "involved" in the investigation is not to be answered by reference to the question whether that person has already carried out identifiable investigative acts. A garda can be "involved" in an investigation by virtue of his or her designated role, if that role entails a direct and significant interest in the outcome of the investigation.

29. The appellant emphasises the evidence that Detective Superintendent Scott would "certainly" have been informed about the incident and would have had an oversight role. It is submitted that such "oversight" in the circumstances was not the independent oversight exercised by, for example, a member in charge of a station deciding whether or not a person should be detained, but was oversight with a view to making sure that the investigation was successful. Because he had a direct professional interest in that outcome, he was not in a position to assess the conflicting interests of the investigators and the persons residing in the dwelling.

30. It is contended that the situation under consideration gave rise to an appearance of bias, and that the "reasonable observer" test is applicable. The argument here is that the decision-maker is required to act judicially, particularly if the decision can result in interference with constitutional rights. The appellant relies in this regard on the analysis in *Damache*, where Denham C.J. said:

> *"…it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially."*

31. The appellant also refers to the decision of this Court in *Reid v. Industrial Development Agency* [2015] 4 I.R. 494 in support of the argument that the "reasonable observer" test, rather than the "real likelihood of bias" test, applies to administrative decision making. McKechnie J, giving the unanimous judgment of the Court, said as follows at p.528:

> *'[74] The test for this class of objection is now well-established: in short, it is the reasonable suspicion or the reasonable apprehension test. Whilst the latter description has been preferred in Bula Ltd. v. Tara Mines Ltd. (No.6) [2000] 4 I.R. 412, both terms continue to be used interchangeably. No longer is there any real suggestion that the once alternative approach, namely a real likelihood of bias, should be considered. The test now to be applied is centrally rooted in the necessity of establishing and maintaining the confidence of the public in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of what*

happened. Therefore, as has been said on numerous occasions, what the parties, the witnesses or even us judges think is not decisive. It is what the reasonable person's view is, albeit a person well informed of the essential background and particular circumstances of the individual case."

32. Finally, on this aspect, the appellant refers to the concept of "structural bias" and submits that the issuing of a search warrant by a Garda is clearly a situation where this concept is relevant. In this regard, a reference in Hogan and Morgan, *Administrative Law* to a Canadian case, *Québec Inc. v Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919 is cited. In that case, Gonthier J. stated:

"The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention."

33. It is argued, however, that the impugned decision-making process in the appellant's case was not simply a case of structural or institutional bias, as the decision-maker had a specific interest in the outcome beyond the goals of the institution generally. In the circumstances, the apprehension of bias on the part of the reasonable observer would, it is contended, be even greater.

34. As far as the consequences of the alleged breach of rights are concerned, the appellant argues that what occurred was a disproportionate interference with the inviolability of his home. It is further submitted that if the Court were to find that the Act permits such interference then the constitutionality of the provision would be called into question. (A plenary summons seeking declaratory relief in this regard has been filed, but not progressed pending this appeal.) On the appellant's case, there should have been an inquiry in accordance with the principles set out in *People (Director of Public Prosecutions) v. J.C.* [2017] 1 I.R. 417 ("*J.C.*"), in which the onus would have been on the prosecution to justify the admission of the evidence. It is argued that both the trial judge and the Court of Appeal

erred on this aspect, in making findings based on matters that in fact required to be further explored in such an inquiry. The possibility is suggested that a *J.C.* inquiry might have concluded that Superintendent Scott disregarded the requirement of independence, and that such a conclusion might have led to a finding that the evidence should have been excluded. The appellant accepts that there was other evidence against him, but argues that without the glove he might have been acquitted. He argues, therefore, that this Court should not apply the proviso set out in s.3(1)(a) of the Criminal Procedure Act 1993 (that is, that the Court may affirm the conviction, notwithstanding that it is of the opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred).

35. The respondent submits that it is clear on the evidence that Detective Superintendent Scott had no involvement in the investigation, and that the sole purpose for which he was contacted was to fulfil the role of an independent superintendent. The fact that he remained, and assisted with the investigation, does not detract from that situation. He was not carrying out a dual role at the time of issuing the warrant, and his divisional role did not necessarily mean that he would become part of or "involved" in the investigation. The respondent argues, by way of analogy, that a factory floor manager is not "involved" in production. It is accepted, however, that as division detective superintendent he would have to have been notified of the shooting incident.

36. It is argued that there is nothing in the evidence to suggest that the detective superintendent did not meet the criteria for independence as set out in *Damache* – that is, the ability to assess the conflicting interests of the State and the individual person. The claim that he had an interest in the successful outcome of the investigation could be made about any serving superintendent and should not, therefore, be accorded significant weight. The requirement under the Act is that there should not have been any *prior* involvement, so that the superintendent concerned can make an objective decision untainted by prior knowledge of the circumstances of the case.

37. The respondent emphasises the urgency of the circumstances, and relies upon the statement in the *Damache* judgment to the effect that the Court was not dealing with an urgent situation in that case. In this case, both witnesses thought that "independent" meant having no prior knowledge, as that was what was conveyed in *Damache*. Even if this Court were

to find that there has been a breach of the appellant's constitutional rights, such a breach could only be described as technical and the analysis in *J.C.* could not have the effect of excluding evidence obtained in such circumstances.

38. It is suggested that it would be difficult to imagine any other superintendent coming to a different decision on viewing the footage. There is, therefore, no basis for an argument that the decision was tainted by partiality or a failure to balance the competing rights concerned.

39. The respondent emphasises that there was other evidence against the appellant apart from the glove – his DNA was found on the bag in the pizzeria and he was visible on the CCTV footage from other times of the day, wearing the same trousers and shoes.

Discussion

40. The discussion necessarily starts with consideration of the judgment in *Damache*, since it is the leading authority on the constitutional requirements for a valid search warrant and is undoubtedly the reason for the amended version of s.29 now found in the Act of 2012.

41. The warrant at the centre of *Damache* authorised the search of a dwelling. It was issued by a detective superintendent who, over the course of some six months, had been investigating an alleged conspiracy to murder a person in Sweden. The appellant was suspected of involvement in the alleged conspiracy and was also suspected of making a threatening phone call to a person in the United States of America. The stated basis for the warrant was a suspicion that evidence relating to the unlawful possession of firearms might be found. No such evidence was found, but the appellant's mobile phone was seized and he was subsequently charged, based on evidence found on the phone, with sending a threatening message.

42. The appellant challenged the constitutionality of s.29(1) of the Act of 1939, which at that time (as amended by s.5 of the Criminal Law Act 1976) empowered a member of the Garda Síochána not below the rank of superintendent to issue a search warrant to a member not below the rank of sergeant, if satisfied that there were reasonable grounds for believing that relevant evidence was to be found in a particular place. He argued that he was entitled as a

matter of constitutional and natural justice to have the decision relating to a search of his home made by a judge or, at least, by an impartial decision-maker unconnected with, and with no material interest in, the investigation. He contended that such a person might have refused to grant a warrant in the circumstances. Since s.29(1) of the Offences Against the State Act 1939, on its face, undoubtedly permitted a warrant to be issued by an officer who was not independent of the investigation (as confirmed in *People (Director of Public Prosecutions) v. Birney* [2007] 1 I.R. 337), he sought a declaration that it was repugnant to the Constitution.

43. The sole judgment was delivered by Denham C.J. She stated that the principle that the person issuing a search warrant should be an independent person was well established, and referred in this context to *Ryan v. O'Callaghan* (Unreported., High Court, (Barr J.), 22nd July 1987) ("*Ryan v. O'Callaghan*") and *Byrne v. Grey* [1988] 1 I.R. 31 ("*Byrne v. Grey"*). *Ryan v. O'Callaghan* concerned a warrant issued by a Peace Commissioner under the provisions of the Larceny Act 1916. An argument was made to the effect that this procedure was not "in accordance with law" and ignored the fundamental norms of the legal order postulated by the Constitution. Barr J. rejected this argument:

> *"In my view it does no such thing. I am satisfied that it is in the interest of the common good that there should be a simple procedure readily available to the police whereby in appropriate cases they may obtain search warrants relating to premises, including the dwellings of citizens, so as to facilitate them in the investigation of larceny and other allied offences. The procedure laid down in Section 42(1) of the 1916 Act contains important elements for the protection of the public, including all those who might be found on the premises to be searched. The investigating police officer must swear an information that he has reasonable cause for suspecting that stolen property is to be found at the premises to be searched and he must satisfy a Peace Commissioner, who* ***is an independent person unconnected with criminal investigation per se****, that it is right and proper to issue the warrant. I am satisfied that such warrants bona fide sought and obtained from a Peace Commissioner pursuant to the procedure laid down in Section 42 of the 1916 Act are not tainted with any constitutional*

illegality and provide lawful authority for the search of the premises to which they relate."

(Emphasis added by Denham C.J.)

44. The analysis in *Ryan v. O'Callaghan* was followed in *Byrne v. Grey*.

45. In *Damache*, it was accepted by the State that the procedure under the Offences Against the State Act 1939 offered less protection to the individual than other statutory procedures that required the decision to be made by a judge or other independent person. The case made was that any such diminution in rights was proportionate and lawful.

46. Denham C.J. noted that the issuing of a search warrant was an administrative act rather than the administration of justice, and that it did not therefore require to be carried out by a judge. However, it was in her view "an action that must be exercised judicially". She cited in this regard the judgment of Keane J. in *Simple Imports v The Revenue Commissioners* [2000] 2 I.R. 243, where it was said:-

"The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any lis *in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings."*

47. Keane J. had gone on to say that the powers enjoyed by the police and other authorities in defined circumstances were conferred on them for the protection of society. However, since they authorised the forcible invasion of a person's property, the court must always be concerned to ensure that the conditions imposed by the legislature for their exercise had been met.

48. Denham C.J. stressed, therefore, the requirement that a search warrant be issued by an independent person who was satisfied on sworn information that there were reasonable grounds for it. However, at paragraph 37, she noted that this might not always be the case.

"In exceptional circumstances, such as urgent situations, provision has been made in statutes for a member of An Garda Síochána to issue a warrant, which usually has a short duration. The requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right."

49. In this context, Denham C.J. cited a number of authorities emphasising the importance of the constitutional protection of the dwelling conferred by Article 40.5, which states that the dwelling is "inviolable" and shall not be forcibly entered "save in accordance with law". Accordingly, she then approached the question whether the procedure under s.29 was "in accordance with law" – that is, whether or not it was a method that ignored the fundamental norms of the legal order postulated by the Constitution.

50. At paragraph 47 of the judgment Denham C.J. stated:

"The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter."

51. Reference was made to the judgment of the European Court of Human Rights in *Camenzind v. Switzerland* [1999] 28 E.H.R.R. 458 and to that of the Supreme Court of Canada in *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145. The following passage from the latter was accepted as setting the appropriately high standard:-

"First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. Inter alia, he must not be someone charged with investigative or prosecutorial functions

under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restrictive Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s. 10(3) search and seizure and do not accord with the neutrality and detachment necessary to balance the interests involved.

Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with s. 8 of the Charter for authorizing searches and seizures. Subsections 10(1) and 10(3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by s. 8 of the Charter."

52. Applying these principles, Denham C.J. stated that it was necessary for the person authorising a search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and should act judicially. There had to be reasonable grounds established that an offence had been committed and that there might be evidence to be found at the place of the search.

53. Reference was also made to the principle of proportionality, as set out in *Heaney v. Ireland* [1994] 3 I.R. 593, and to the recommendation of the Morris Tribunal that the power to issue warrants under s.29 should be vested in a judge with, perhaps, a residual power vested in senior officers to be used in exceptional circumstances.

54. At the conclusion of the judgment, the two factors described as being at the kernel of the Court's decision in *Damache* were summarised.

"*A member of An Garda Síochána who is part of an investigating team is not independent on matters related to the investigation. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person, such as the appellant. In this case the person authorising the warrant was not independent. In the circumstances of this case a person issuing the search*

warrant should be independent of An Garda Síochána, to provide effective independence.

The circumstances of the appellant's case also include the fact that the place for which the search warrant was issued, and which was searched, was the appellant's dwelling house… Entry into a home is at the core of potential State interference with the inviolability of the dwelling."

55. The Court's conclusion was that the section was repugnant to the Constitution because it permitted a search of a home on foot of a warrant not issued by an independent person. However, the Court once more stressed that there were no circumstances of urgency in the case, and that it had not considered or addressed a situation of urgency.

56. The amended version of s.29 now reads, in full, as follows:-

29(1) – In this section 'an offence to which this section applies' means –

(a) an offence under this Act,
(b) an offence under the Criminal Law Act 1976,
(c) an offence which is for the time being a scheduled offence for the purposes of Part V of this Act,
(d) treason, or
(e) an offence of attempting or conspiring to commit, or inciting the commission of, and offence referred to in paragraph (a), (b) or (d).

(2) If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.

(3) Subject to subsections (4) and (5), if a member of the Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds

for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.

(4) A member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under this section unless he or she is satisfied-

(a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and

(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.

(5) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under this section only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought.

(6) A search warrant under this section shall be expressed, and shall operate, to authorise the member of the Garda Síochána named in the warrant, accompanied by such members of the Garda Síochána or of the Defence Forces as the member considers necessary –

(a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so required of the warrant or a copy of it, and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search it and any persons found at that place, and

(c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an offence to which this section applies.

(7) Notwithstanding subsection (6), a search warrant issued by a member of the Garda Síochána not below the rank of superintendent under this section shall cease to have effect after a period of 48 hours has elapsed from the time of the issue of the warrant.

(8) A member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section may –

> *(a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and*
>
> *(b) arrest without warrant any person who –*
>
> > *(i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,*
> >
> > *(ii) fails to comply with a requirement under paragraph (a), or*
> >
> > *(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.*

(9) A person who obstructs or attempts to obstruct a member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (8)(a) or who gives a false or misleading name or address to the member shall be guilty of an offence and shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.

(10) The power to issue a search warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

(11) A member of the Garda Síochána not below the rank of superintendent who issues a search warrant under this section shall, either at the time the warrant is issued or as soon as reasonably practicable thereafter, record in writing the grounds on which the warrant was issued, including how he or she was satisfied as to the matters referred to in subsection (4).

(12) In this section –

'independent of', in relation to the investigation of an offence, means not being in charge of, or involved in, that investigation;

'place' includes –

(a) a dwelling or a part thereof,
(b) a building or a part thereof,
(c) a vehicle, whether mechanically propelled or not,
(d) a vessel, whether sea-going or not,
(e) an aircraft, whether capable of operation or not, and
(f) a hovercraft.

57. It will be seen that the Act distinguishes between judicial warrants and warrants issued by a member of the Garda Síochána in three important respects. Firstly, the former are issued on the basis of sworn information, which is not a requirement for garda warrants. Secondly, judicial warrants are valid for a period of one week, while garda warrants cease to have effect after 48 hours. Thirdly, an officer who issues a warrant under the section is obliged to record in writing, either at the time the warrant is issued or as soon as reasonably practicable thereafter, the grounds upon which the warrant was issued including how he or she was satisfied as to the matters referred to in subs. (4). There is, however, no distinction in relation to either the powers conferred on persons acting under the warrant or the obligations imposed on persons found in the place where a search is carried out.

58. At this point it becomes necessary to emphasise the fact that the two procedures established by the statute are clearly intended to be applicable in very different sets of circumstances. The general rule is that searches may be carried out only on foot of warrants issued by judges of the District Court who are satisfied, on the basis of sworn information, that the statutory criteria are met. This procedure respects the constitutional guarantee of the inviolability of the dwelling, in that it ensures that premises can be forcibly entered only where a judge, who is independent of the investigation of crime and who is acting on foot of properly presented sworn evidence, accepts that interference with the rights of the inhabitants is justifiable. Absent some specific evidence in a particular case, no concern should arise about bias in any of the forms known to law.

59. By contrast, it seems clear that the provisions permitting the issuing of search warrants by members of the Garda Síochána do not, and indeed could not, comply with the general standards set out in *Damache*. However, these provisions are exceptions to that general rule and are applicable only in situations of urgency – where it is not practicable to apply to a judge of the District Court, a warrant may be issued by a member of the requisite rank. That member will not be empowered to take evidence on oath, may not have the neutrality and detachment required of a judge and might well not satisfy an observer who fears that the decision may be influenced by institutional bias. However, it is clearly necessary to make some such provision for urgent situations where a judge is not readily available. The judgment in *Damache* makes it abundantly clear that the Court was prepared to accept that different standards might apply in such situations.

60. The basic safety-net feature of the statutory procedure as it now stands is that, even in cases of urgency, the member must be "independent" of the investigation. In so providing, the legislature may arguably have gone further than the Court in *Damache* might have found necessary in circumstances of urgency, but that is of course its entitlement. "Independence" in this context does not require independence from the force, or from the normal role of the member concerned, but the Act stipulates that the member must be neither in charge of nor involved in the investigation.

61. The first question to be determined by the Court, therefore, is whether Detective Superintendent Scott, the division detective superintendent, could properly have been described as "being in charge of" or "being involved" in the investigation. In my view this question must be answered by reference to the time he issued the warrant, and not by his role, actions or state of knowledge at either an earlier or later time – the warrant was either valid or not valid at the time it was issued. Equally, I do not believe that the motivation of Superintendent Donnelly, in making the request of Detective Superintendent Scott, is relevant – the Act is concerned only with the member who issues the warrant.

62. The evidence in relation to the role of division detective superintendent does not lead to a conclusion that a member holding that position could be said to be "in charge" of an investigation. I would agree that his use of the word "oversight" in this context does not carry the connotation that the division detective superintendent takes over managerial or operational responsibility for all aspects of an investigation. However, it seems to me that

he or she must, inevitably, be considered to be "involved", on being notified that a serious incident has occurred and is being investigated. I come to that view on the basis of the evidence – it was Detective Superintendent Scott's job to be involved, in order to take on an oversight function and to ensure that the investigation was carried out as effectively as possible. To use the words of the judgment in *Damache*, he was "part of an investigating team". One might usefully compare his position with that of Superintendent Donnelly, who was clearly "in charge" of the investigation once he was informed about what had happened. That was because it was his job to take charge.

63. It may or may not be possible that, had Superintendent Donnelly decided to look elsewhere for a warrant, Detective Superintendent Scott might not have been informed of the matter until a later stage – the Court does not have sufficient evidence to determine whether or not he would invariably have been immediately notified of an incident as serious as this one, no matter what the hour. However, it seems to me that the salient point is that he had a role in the matter once he was in fact notified and would, at the latest, be in attendance at any meeting held that day, in order to exercise his oversight function. It would, I think, be wholly artificial to consider that he arrived at the shopping centre in the capacity only of a superintendent who had been asked for a search warrant, and only assumed his role of division detective superintendent once that had been dealt with.

64. Two members of the Court, Charleton and Woulfe JJ, have come to a different view of the applicability of the section on the facts of this case. In essence, they see the exclusion as applying only where the member in question has already taken some steps or role in the investigation, on the basis that until that happens he or she is not "involved". I acknowledge that this is a tenable interpretation of the Act. However, it seems to me that, in circumstances where it can safely be assumed that the legislature was conscious of not only the fact that this Court had found s.29 of the Act of 1939 to be unconstitutional but also of the grounds for that ruling, the intention was to ensure respect for the *nemo iudex in causa sua* principle that underpinned *Damache*. The judgment specifically stated that a member of an investigation team could not be seen as independent. Based on the evidence as to the role of division detective superintendent, I cannot see that the holder of that position can be described other than as part of the investigation team, from the moment when he or she is notified of a serious incident that will require him or her to carry out that role.

65. Woulfe J., further, regards this interpretation as wrongly excluding a category of superintendents who are intended by the legislature to be empowered to issue warrants in urgent circumstances. I do not consider this to be the effect of the view I have come to – there would be nothing to prevent a division detective superintendent from issuing a warrant in respect of a matter outside his own district where he is not otherwise involved.

66. I would be inclined to conclude therefore, that there was a breach of the statutory requirements. Such a finding, however, would by no means dispose of the case.

67. Section 3 of the Criminal Procedure Act 1993 provides that the Court may affirm a conviction, notwithstanding that the appellant raises an argument that could be determined in his favour, if it is satisfied that there has been no miscarriage of justice. The appellant says that the Court should not exercise this power, because a *J.C.* inquiry could have led to the exclusion of the evidence of the glove, in which circumstances he might have been acquitted.

68. The Court has not been referred to any authority setting out the general principles to be considered in applying the proviso, perhaps because the circumstances in which an appellate court will apply it are highly case-specific. However, certain judgments are of relevance to the issue now before the Court. In *People (DPP) v Fitzpatrick and McConnell* [2013] 3 I.R. 656("*Fitzpatrick & McConnell*") the Court of Criminal Appeal considered that one of the appellants had not been afforded a reasonable opportunity to consult his solicitor before the invocation of ss. 18 and 19 of the Criminal Justice Act 1984 (which permit the drawing of adverse inferences in certain circumstances). Delivering the judgment of the Court, O'Donnell J. said the following:

> *"The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of the first appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the first appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed.*

However, it cannot be said here that the proceedings were fundamentally flawed. The significance of any inference to be drawn under s. 18 of the Criminal Justice Act 1984 may depend upon the particular facts of individual cases. Most often, as the section itself recognises, its main effect will be to provide corroboration where that is required either by a rule of law, or by the general practice of the courts in respect of particular offences. Here, however, there was no question of the evidence against the accused requiring corroboration either as a matter of law or practice. It was direct and compelling evidence of involvement in the preparation of bombs."

69. Accordingly, the Court was satisfied that no miscarriage of justice had occurred.

70. In *People (DPP) v. Sheehan* [2021] IESC 49 this Court approved the formulation in *Fitzpatrick & McConnell* as representing the correct approach where an appellate court is dealing with the wrongful admission of evidence, in another case where the evidence in question did not play a legally necessary role in the verdict of the jury. However, in both of those cases the outcome was clear, in that it was only necessary for the appellate court to determine whether there would, in truth, have been a chance of an acquittal if the respective juries had not been invited to draw inferences from particular material that was, in itself, properly admissible.

71. The question now before the Court is somewhat more complex. It is not open to the appellant, in this appeal, to make a direct argument to the effect that the trial judge should have excluded the evidence. Rather, he complains of the loss of an opportunity to argue in the trial, in the context of a *J.C.* inquiry, that it should have been excluded. The issue, then, is whether the decision of the trial judge that the warrant was valid and that a *J.C.* inquiry was therefore not necessary, could be described as a fundamental error, or a departure from the essential requirements of the law, that resulted in a lost chance of an acquittal. It will, in many if not most appeals, be difficult for an appellate court to be certain what might have transpired if a *J.C.* inquiry was conducted since, by definition, it does not have the necessary evidence before it. However, certain matters can, I think, be legitimately taken into consideration. One is that it was only the position of Superintendent Scott that was relevant. If, for example, the trial judge had concluded that Superintendent Donnelly had made his request to him merely for the sake of convenience, that would not have the effect

of leading to a conclusion that the evidence should be excluded. However, it is clear from the evidence that was given that Detective Superintendent Scott shared the view of Superintendent Donnelly that "independence", under the Act, meant not having already taken any steps in the investigation. While I consider that interpretation to be mistaken, it is one shared by two members of this Court and is certainly a tenable one in circumstances where the courts have not previously given an authoritative view of the section.

72. Secondly, a *J.C.* inquiry would have to have taken into account the fact that, while there was a breach of the statute insofar as the role of Detective Superintendent Scott was concerned, the actual manner in which he considered the question of the warrant was not open to any real criticism. He viewed the footage and made up his own mind, without reliance upon the assessment of others. Furthermore, it was entirely clear (and, indeed, this has been part of the case made by the appellant) that a valid warrant could easily have been obtained from any other superintendent in the District, or indeed any one of a large number of superintendents in the Dublin area. In *J.C.,* Clarke J. described the significance of this factor in the following terms (at paragraph 862):

> *"There is one further refinement which, in my view, ought to be added. It is important to distinguish between evidence gathering which occurs in circumstances where same could not have been constitutional in any circumstances, on the one hand, and evidence gathering which was capable of being lawful and would have been lawful were it not for the absence of some appropriate form of valid authorisation specific to the facts of the case in question. In the latter category, cases would also arise where there was an authorisation, but where there was some defect in the authorisation concerned. In that context, there is a difference between prosecuting authorities being able to rely, on the one hand, on evidence, the gathering of which was not authorised, but which could have been authorised, and where the absence, inaccuracy or invalidity of or in the relevant authorisation was not adverted to, and, on the other hand, evidence gathering which could never have been authorised at all."*

73. The test agreed upon by the majority in *J.C.* would therefore distinguish, to some extent, evidence that could have been obtained lawfully but that was in fact gathered by a procedure that was in some way defective from evidence that could never have been

gathered lawfully. It seems to me that a single fact is inescapable in this particularly unusual case – no other person, whether a member of the Garda Síochána or a judge, could have rationally declined to issue a search warrant in the circumstances as they pertained. The argument made by the appellant is that the evidence should be excluded because the wrong person was asked, but he has not explained how any other person might have assessed the matter differently.

74. I would accordingly be inclined to agree with the Court of Appeal view that the error in this case was one that made no practical difference. Further, since the Court has now ruled upon the interpretation of the section, it is an error that should not be repeated and should not arise in future cases.

75. However, on the assumption that a *J.C.* inquiry could, for some reason, have led to the exclusion of the evidence, it is necessary to consider whether the appellant could then have been acquitted. In my view, this could not have been much more than a remote possibility, even without the glove. There was incontrovertible evidence that the raider came from, and returned to, the home of the appellant. Once the youngest of the brothers was eliminated from inquiries, the other two were the only realistic suspects. The appellant told the gardaí that he was at home, but there is no suggestion that the CCTV footage showed a different man leaving and returning to the house. The raider was wearing the clothes and shoes that the appellant had been wearing earlier in the day, and his DNA was on the plastic bag thrown onto the counter during the attempted robbery. It is apparent from the jury verdict that they were satisfied from the footage that Anthony was the man who received the bicycle from the perpetrator outside the house, after the shooting. That left the appellant as the only possible raider. The evidence against him was more than sufficient for a conviction, even without the glove.

76. In the circumstances, I do not consider that the conviction amounts to a miscarriage of justice. I would dismiss the appeal.